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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARKANSAS BEST CORPORATION,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE THE CIRCLE K CORPORATION IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE THE CIRCLE K CORPORATION IN SUPPORT OF PETITIONER*

THE INTEREST OF AMICUS CURIAE

The Circle K Corporation ("Circle K") is the plaintiff in a case now pending before the United States Claims Court, *The Circle K Corporation v. United States*, No. 12-86 T. A major issue in that case involves the application of this Court's decision in *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46 (1955), to Circle K's purchase and sale of shares of stock of a corporation which owned producing oil and gas reserves.

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* Both Petitioner and Respondent have consented to the filing of this brief, and the written consents are on file with the Clerk. The decision below is reported at 800 F.2d 215 (8th Cir. 1986).

Circle K is an operator of convenience stores with its headquarters in Phoenix, Arizona. In the early 1960's, Circle K pioneered the operation of self-service gasoline facilities at its convenience stores, and by 1980 gasoline sales accounted for approximately 30% of Circle K's total sales and produced customer traffic for a substantial percentage of its non-gasoline sales.

Gasoline shortages in 1973-1974 and 1979-1980, and the continued threat of future gasoline shortages, prompted Circle K's management to seek arrangements for insuring adequate and reliable sources of gasoline for its stores. In pursuit of this goal, Circle K tried during the 1960's and 1970's to obtain long-term supply contracts with major oil companies for refined gasoline and tried to acquire refineries. For various reasons all of these attempts failed, and by the end of the 1970's, Circle K remained without a reliable source of supply.

In 1980, Circle K's attention was directed toward Nucorp Energy, Inc. (Nucorp) as a possible solution to its gasoline supply problem. Nucorp was an oil and gas exploration and development company which had major producing oil and gas reserves. After investigation and negotiations between Circle K and Nucorp, Circle K purchased a substantial amount of Nucorp stock in order to obtain a source of supply of gasoline in the event shortages again occurred.

Nucorp expanded rapidly thereafter, incurring substantial debt. As world-wide oil shortages ended in the early 1980's and the price of oil dropped rapidly, Nucorp's financial situation became precarious, and in July of 1982, Nucorp filed for reorganization under Chapter 11 of the Federal Bankruptcy Code. In early 1983, after it was clear that Nucorp would not continue to be an available solution to the supply problem, Circle K sold its stock in Nucorp, suffering a substantial loss.

Circle K deducted the loss as an ordinary loss on its income tax return for its fiscal year ended April 30, 1983, based on this Court's decision in *Corn Products* and related cases. The loss was disallowed on audit by the Internal Revenue Service, Circle K paid the resulting deficiency, filed a Claim for Refund and, after the claim was disallowed, filed suit for refund of the tax paid in the United States Claims Court. The Government's discovery in the Claims Court case is almost completed, and the trial will probably be completed before the end of 1987 unless it is postponed pending this Court's decision in this case.

If this Court should affirm the opinion below, holding that shares of stock can never be treated as anything other than capital assets when held by a taxpayer other than a securities dealer, no matter why they were purchased, held and sold, and regardless of the attendant circumstances, that affirmation will adversely affect Circle K's refund suit on this issue. If this Court instead reaffirms the principles set forth in its *Corn Products* decision, Circle K will be given the opportunity to prove that its losses should not be treated as losses from the sale of capital assets and, if it carries that burden successfully, to deduct those losses against the income from its business in which those losses were incurred.

SUMMARY OF ARGUMENT

This Court's decision in *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46 (1955), acknowledges and stands for the proposition that the literal language of the enumerated exclusions set out in the predecessor to Section 1221 of the Internal Revenue Code of 1954 does not include all non-capital assets. This Court decided that a narrow construction of the term "capital asset" and a broad interpretation of the enumerated

exclusions are needed to effect Congressional purpose. *Id.* at 52.

Two of the three judges who heard this case in the Court of Appeals decided, however, that the *Corn Products* decision must be confined to its facts and may not be read to permit the treatment of stock held by someone other than a securities dealer as anything other than a capital asset, regardless of the circumstances and purposes for which it was purchased and held. Their decision conflicts with decisions of this Court, with every other Circuit Court that has addressed the issue, with the United States Claims Court and the United States Tax Court, and is inconsistent with the prior opinions of the Eighth Circuit Court of Appeals itself.

The language of Section 1221 of the Code and its interpretation by Treasury regulations and Internal Revenue Service rulings permits judicial exclusion of transactions that should not receive capital treatment when that exclusion is necessary to effect Congressional purpose. Congress has considered and accepted *Corn Products* as applied by the courts generally, including its application to purchases of stock, and has considered and declined to adopt the position of the Eighth Circuit panel in this case.

Corn Products recognizes the practical considerations of doing business. It acknowledges that it is impossible to anticipate by statutory rule the almost infinite spectrum of ways in which taxpayers may need to respond to the operating needs of their businesses and allows the proper matching of tax consequences to the economic substance of transactions.

ARGUMENT

I. THE LANGUAGE OF SECTION 1221 AND OF ITS INTERPRETATIVE REGULATION PERMITS EXCLUSIONS BEYOND THOSE EXPRESSLY ENUMERATED.

The majority of the three-judge panel for the Court of Appeals decided that the shares of stock purchased by Arkansas Best had to be treated as capital assets because they were not specifically described by any of the statutory exclusions, as though Code Section 1221 defined "capital asset" to mean, "*all* property held by the taxpayer . . . *except,*" or "*all* property . . . *other than,*" or "*all* property . . . *except the following,*" *i.e.*, language not permitting the exclusion of any *item* of property, regardless of circumstances, unless described in a statutory exclusion.[1] But the statute does not say that, Treasury Regulations do not give the definition that construction, and the Internal Revenue Service does not follow that construction in its administration of the capital gain and loss provisions.

Section 1221 simply says that "capital asset means property held by the taxpayer . . . but does not include . . . ." It does not

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[1] *Arkansas Best Corp. & Subsidiaries v. Commissioner*, 800 F.2d 215, 218 (8th Cir. 1986). The Court of Appeals opinion (*Id.* at 218) quoted a statement in the Ways and Means Committee Report, H.R. REP. No. 704, 73rd Cong., 2d Sess. 31 (1934), for the Revenue Bill of 1934, stating, "It will be noted that the definition [of "capital assets"] includes all property, except as specifically excluded." The remark was not a contemporaneous construction (the statutory language, "capital asset means property held by the taxpayer . . . but does not include . . .," originated 13 years earlier in the Revenue Act of 1921, ch. 136, 42 Stat. 227, at 233 (1921)) and the remark was not made in the context of changing the definition. The only definitional change made by the House was to remove the holding period from the definition.

say, "all property," and the language it has always used to preface the statutory exclusions, "but does not include,"[2] does not rule out the possibility that "capital asset" also "does not include" some item of property not falling within the descriptions of the classes excluded by the statute if that exclusion is necessary to effect Congressional purpose.[3]

The Treasury Regulation's interpretation[4] is consistent with this construction. It says, "The term, 'capital assets,' *includes* all *classes* of property not specifically excluded by section 1221" (emphasis added), meaning simply that there are no other excluded *categories or classes.* That is not the same as saying, and the Regulation does not say, that every item of property outside the description of each excluded class is a capital asset. A share of stock in Acme Corporation can represent among other possibilities a long-term portfolio investment for an investor, inventory for a securities dealer, the right to a ratable share of Acme's production for Acme's distributor, an opportunity for a short-swing profit on the stock market for a securities trader, and future compensation income upon its sale for Acme's employee. The Internal Revenue Service has construed the definition of Section 1221 in that manner in administering the capital gain and loss provisions.[5]

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[2] The phrase originated in Section 206(a)(6) of the Revenue Act of 1921, ch. 136, 42 Stat. 227, 233 (1921).

[3] *See* Code Section 7701(c) defining "includes" and "including."

[4] Treas. Reg. § 1.1221-1(a) (1957).

[5] *See, e.g.,* Rev. Rul. 58-40, 1958-1 C.B. 275; Rev. Rul. 72-238, 1972-1 C.B. 65; Rev. Rul. 78-396, 1978-2 C.B. 114.

II. CONGRESS CONSIDERED AND DECLINED TO ADOPT THE POSITION TAKEN BY THE EIGHTH CIRCUIT IN THIS CASE AND, INSTEAD, ACCEPTED THE APPLICATION OF *CORN PRODUCTS* TO STOCK.

The House Committee on Ways and Means for the 94th Congress was asked to amend the Code by adopting a flat rule that all securities acquired for business reasons (except securities acquired by dealers and except for certain bonds acquired by banks) be considered capital assets. Dispositions of all such securities would then receive capital gain or loss treatment regardless of the circumstances surrounding their acquisition and sale. Both houses of Congress declined to adopt such a rule and, instead, passed legislation which accepted the application of *Corn Products* to provide ordinary gain or loss treatment for sales of securities in appropriate circumstances.

The history of this Congressional action began in 1975 when a member of the Committee on Ways and Means introduced H.R. 10902 in the first session of the 94th Congress, proposing the addition of a new Section 1254 to Subchapter P of the Internal Revenue Code of 1954.[6] The committee reports on the bill described current law and the reason for H.R. 10902 as follows:

> The question of whether a security (or any asset) is a capital asset is factual and depends on the facts and circumstances of the particular case, i.e., whether the taxpayer acquired and held the security as an investment or whether he acquired and held it for sale to customers in

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[6] 121 CONG. REC. 37,907 (1975). The text of H.R. 10902 as introduced may be found in *Miscellaneous Minor Tax Bills, 1975: Hearings Before the House Committee on Ways and Means*, 94th Cong., 1st Sess., at 202-203 (1975).

> the ordinary course of business or held the stock for use in his business.
>
> . . . .
>
> Purchases of stock to protect the taxpayer's source of income or his source of supply of another company's products have been held to be situations of this general kind where taxpayers have often been upheld in treating their loss as ordinary rather than capital. Few, if any, situations have arisen, however, where in similar circumstances a gain on later sale of the stock or securities has been held to be ordinary income. [Footnote omitted.]
>
> Your committee has concluded that, under present law, a taxpayer can too readily obtain the best of both worlds when he sells or exchanges a stock or other security and knows whether he has a gain or a loss, by contending that he did not hold the stock as an investment (if he wants ordinary loss treatment) or that he did hold it as an investment (if he wants capital gain treatment).

H.R. REP. No. 1360, 94th Cong., 2d Sess. 3 (1976); S. REP. No. 1392, 94th Cong., 2d Sess. 2-3 (1976). Each of the three cases cited by the reports as examples of current law applied the approach of *Corn Products* to determine whether a loss on the sale or worthlessness of stock that had been purchased by a business or for a business purpose should be treated as an ordinary or capital loss.[7]

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[7] *Union Pacific R.R. Co. v. United States*, 524 F.2d 1343 (Ct. Cl. 1975), *cert. denied*, 429 U.S. 827 (1976) (on the facts, upholding ordinary loss treatment); *W. W. Windle Co. v. Commissioner*, 65 T.C. 694 (1976), *appeal dismissed*, 550 F.2d 43 (1st Cir.), *cert. denied*, 431 U.S. 966 (1977) (on the facts, denying ordinary loss treatment); *Corsello v. Commissioner*, 35 T.C.M. (CCH) 832 (1976) (on the facts, upholding ordinary loss treatment).

H.R. 10902 addressed this by requiring, as a condition precedent to claiming an ordinary loss, that the taxpayer notify the Internal Revenue Service within 30 days after acquiring the security that he did not acquire it as an investment.[8]

The Department of the Treasury opposed H.R. 10902 and suggested an alternative solution, almost identical to the rule adopted by the Eighth Circuit panel's majority opinion in this case: "Treasury suggests that the Committee consider whether ordinary income and loss treatment on the sale of securities should be eliminated in all cases." STAFF OF THE JOINT COMM. ON INT. REV. TAX., 94th CONG., 1st SESS., DESCRIPTION OF TECHNICAL AND MINOR BILLS LISTED FOR A HEARING, (Comm. Print 1975).[9]

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[8] H.R. 10902 provided that if a business taxpayer (other than a securities dealer) realized a loss on sale of the security, he would be permitted to contend for ordinary loss treatment only if he had filed the notice of no investment purpose within 30 days after his purchase, and if he had not filed the notice, he would receive capital loss treatment, regardless of the circumstances. If, however, the taxpayer had filed the notice of no investment purpose, a gain on the later sale of the security would not be given capital gain treatment, regardless of circumstances. The bill left the Commissioner free to impose ordinary gain treatment under *Corn Products* even though the business taxpayer did not file the notice.

[9] At a public hearing on the bill before the Ways and Means Committee, one of the witnesses also urged the Treasury Department's alternative of a flat prohibition:

> I would suggest to the committee when they mark up this bill that they consider a flat rule that all securities acquired by businesses should be considered capital assets and therefore receive capital gains treatment, except for dealers in securities, who would obviously be accorded ordinary income treatment. Also the bank bonds under section 852, which is mentioned in the pamphlet should be exempted.

The Committee on Ways and Means did not adopt the proposed alternative. Instead, it approved H.R. 10902, accepting the possibility of ordinary loss treatment for securities acquired for business purposes and reported the bill to the full House[10] which passed it as reported on August 24, 1976.[11] The Senate Finance Committee also did not adopt the Treasury's suggestion, although it amended the bill to prohibit the taxpayer from avoiding his notice of no investment purpose by a transfer to a related party that would not file the notice.[12] The bill, as amended, was reported to and passed by the Senate on October 1, 1976.[13] The House and Senate adjourned on that day,[14] and H.R. 10902 did not go to a conference of the two houses.

Since 1976, five Congresses have had the opportunity to return to the subject and reconsider the proposed ban on ordinary gain or loss treatment for sales of stock which both the House Committee on Ways and Means and the Senate

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Miscellaneous Minor Tax Bills, 1975: Hearings Before the House Committee on Ways and Means, 94th Cong., 1st Sess. 149-150 (1975) (Statement of Robert Brandon, Director, Public Citizens' Tax Reform Research Group).

[10] 122 CONG. REC. 23,549 (1976). On the floor, the Chairman of the Committee on Ways and Means (Mr. Ullman) and a minority member (Mr. Steiger) urged passage, explaining the bill as in the committee reports. 122 CONG. REC. 27,459-60 (1976). The text of Section 1254 in H.R. 10902 as reported and passed by the House may be found in H. REP. NO. 1360, 94th CONG., 2d SESS., at 6-7 (1976).

[11] 122 CONG. REC. 27,499 (1976).

[12] For a description of the Senate Finance Committee amendment, *see* S. REP. NO. 1392, 94th CONG. 2d SESS. 4-5 (1976).

[13] 122 Cong. Rec. 34,589, 34,664 (1976).

[14] 122 Cong. Rec. 35,078, 35,377 (1976).

Committee on Finance declined to adopt in 1976. Although Congress has considered and enacted tax legislation in each of the years 1977 through 1986,[15] it has not passed any provision to place gain or loss from disposition of stock beyond the reach of *Corn Products* or even to place some limitation on the application of that decision.[16]

III. THE EIGHTH CIRCUIT PANEL'S INTERPRETATION OF *CORN PRODUCTS* IN THIS CASE IS INCONSISTENT WITH THE VIEWS OF THAT CIRCUIT EXPRESSED IN ITS PRIOR DECISIONS.

The majority on the Eighth Circuit's three-judge panel in this case said,

> We do not read *Corn Products* as either requiring or permitting the courts to decide that capital stock can be anything other than a capital asset under Section 1221.

800 F.2d at 221. This narrow reading of *Corn Products* is not reflected in any prior opinion of the Eighth Circuit. In contrast, that Court had, prior to its decision in this case, avoided

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[15] *See, e.g.*, Tax Reduction and Simplication Act of 1977, PUB. L. NO. 95-30, 91 Stat. 126 (1977); Revenue Act of 1978, PUB. L. NO. 95-600, 92 Stat. 2763 (1978); PUB. L. NO. 96-167, 93 Stat. 1275 (1979); PUB. L. NO. 96-601, 94 Stat. 3495 (1980); Economic Recovery Tax Act of 1981, PUB. L. NO. 97-34, 95 Stat. 172 (1981); Tax Equity and Fiscal Responsibility Act of 1982, PUB. L. NO. 97-248, 96 Stat. 324 (1982); Interest and Dividend Tax Compliance Act of 1983, PUB. L. NO. 98-67, 97 Stat. 369 (1983); Defieit Reduction Act of 1984, PUB. L. NO. 98-369, 98 Stat. 494 (1984); PUB. L. NO.99-121, 99 Stat. 505 (1985); Tax Reform Act of 1986, PUB. L. NO. 99-514, 100 Stat. 2085 (1986).

[16] *Cf. Corn Products Ref. Co.*, 350 U.S. 46, 52-53 (1955) (in view of a well-recognized 20-year-old interpretation, Congress' failure to change it while re-enacting the Code on several occasions "bespeaks congressional approval.").

such a dogmatic, inflexible approach. The Eighth Circuit's opinions on the process of determining whether some item of property is within or without the Code's "capital asset" definition are as follows.[17] In *Greenspon v. Commissioner*, 229 F.2d 947, 951 (8th Cir. 1956):

> In general, the courts take the position that each case must be determined upon its particular facts, and that *no definite formula for deciding cases of this type can be prescribed.* [Emphasis added.]

In *Frank v. Commissioner*, 321 F.2d 143, 148 (8th Cir. 1963):

> It has been said that no fixed formula exists for resolving the issue; that no one factor is necessarily decisive, and that "a congeries of factors is to be considered and weighed." *Tidwell v. Commissioner*, 298 F.2d 864, 866 (4 Cir. 1962); *Lockhart v. Commissioner*, 258 F.2d 343, 347 (3 Cir. 1958).

And from the same opinion, *id.* at 148-149:

> We also have in mind that the phrase "capital asset" in § 1221 is to be narrowly applied; that its exclusions are to be interpreted broadly; and that every day operations of a business are directed to ordinary income or loss rather than to capital gain or loss. *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46, 52 (1955); *Commissioner v. P. G. Lake, Inc.*, 356 U.S. 260, 265 (1958); *Commissioner v. Gillette Motor Transport, Inc.*, 364 U.S. 130, 134 (1960).

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[17] The majority opinion of the Eighth Circuit's three-judge panel in this case ignores these views. It cites to *Frank v. Commissioner*, 321 F.2d 143 (8th Cir. 1963), but only for the holding that since the taxpayers in that case were in the business of selling securities, they were not entitled to capital gain treatment for their stock sale profits. 800 F.2d at 219.

In *Vaaler v. United States,* 454 F.2d 1120, 1122 (8th Cir. 1972):

> Over the years considerable case law has evolved to further illuminate the meaning of the term "capital asset." In *Commissioner v. Gillette Motor Transport,* 364 U.S. 130, at 133, 80 S.Ct. 1497, at 1500 4 L.Ed.2d 1617, at 1621, Mr. Justice Harlan writing for the Court said, "While a capital asset is defined in § 117(a)(1) as 'property held by the taxpayer,' it is evident that not everything which can be called property in the ordinary sense and which is outside the statutory exclusions qualifies as a capital asset .... Thus the Court has held that an unexpired lease, *Hort v. Commissioner,* 313 U.S. 28, 61 S. Ct. 757, 85 L.Ed. 1168, corn futures, *Corn Products Ref. Co. V. Commissioner,* 350 U.S. 46, 76 S.Ct. 20, 100 L.Ed 29, and oil payment rights, *Commissioner v. P.G. Lake, Inc.,* 356 U.S. 360, 78 S.Ct. 691, 2 L.Ed.2d 743, are not capital assets even though they are concededly 'property' interests in the ordinary sense."

And from the same opinion, *id.,* at 1122, quoting approvingly from *Commissioner v. Ferrer,* 304 F.2d 125, 129 (2d Cir. 1962):

> Section 117(a) of the 1939 Code, now § 1221 of the 1954 Code, 26 U.S.C.A. § 1221, tells us, not very illuminatingly, that "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include four (now five) types of property therein defined. *However it has long been settled that a taxpayer does not bring himself within the capital gains provision merely by fulfilling the simple syllogism that a contract normally constitutes "property," that he held a contract and that his contract does not fall within a specified exclusion. C. I. R. v. Gillette Motor Transport, Inc.,* 364 U.S. 130, 134-135, 80 S.Ct. 1497, 4 L.Ed.2d 1617 (1960); Surrey, Definitional Problems in Capital Gains Taxation, 69 Harv. L. Rev. 985, 988 (1956). This is easy enough; *what is difficult,*

perhaps impossible, is to frame a positive definition of universal validity. [Emphasis added.]

IV. *CORN PRODUCTS* ALLOWS FOR THE PROPER MATCHING OF TAX CONSEQUENCES TO THE UNDERLYING ECONOMIC SUBSTANCE OF BUSINESS MOTIVATED TRANSACTIONS.

This Court, in *Corn Products* and in other cases which preceded and followed it, has consistently held that the Code definition of capital asset must be interpreted narrowly and the exclusions from that definition broadly,[18] in order to properly categorize capital and non-capital assets. These cases recognize the practical impossibility of drafting a statute that would

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[18] *Corn Products Ref. Co. v. Commissioner,* 350 U.S. 46, 52 (1955). *Cf. United States v. Midland-Ross Corp.,* 381 U.S. 54 (1965); *Commissioner v. Brown,* 380 U.S. 563 (1965); *Commissioner v. Gillette Motor Transport, Inc.,* 364 U.S. 130 (1960); *Commissioner v. P. G. Lake, Inc.,* 356 U.S. 260 (1958); *Kieselbach v. Commissioner,* 317 U.S. 399 (1943); *Hort v. Commissioner,* 313 U.S. 28 (1941); *Burnet v. Harmel,* 287 U.S. 103 (1932).

Respondent in its Brief on Petition for a Writ of Certiorari (pp. 11 and 12) misperceives that a statement of this Court in *Malat v. Riddell,* 383 U.S. 569, 572 (1966), supports Respondent's belief "that this Court's holding in *Corn Products* . . . was that the corn futures in the circumstances of that case fell within the 'inventory' exception to what is now Section 1221." As support for that reading of *Corn Products,* the Respondent refers to a statement in this Court's opinion in *Malat* which Respondent quotes as follows: "[a] literal reading of [Section 1221] is consistent with [its] legislative purpose." The Respondent, however, substituted "Section 1221" for this Court's reference to "the statute." The substitution significantly distorts the meaning of this Court's statement. "[T]he statute" to which this Court was referring was paragraph (1) of § 1221, and the question was whether a literal reading of the word "primarily," in paragraph (1) to mean, "of first importance," was consistent with the legislative purpose of Section 1221.

precisely divide all assets into capital and non-capital categories in all the contexts and circumstances which may arise.[19]

Rather than elevate form over substance,[20] as does the majority opinion of the Eighth Circuit panel in this case, this Court has considered the purpose for which an asset was acquired and held, together with its nominal nature. This approach allows tax consequences to turn on the underlying economic substance of a transaction, taking into account the context and relevant circumstances surrounding the purchase, retention, and disposition of an asset by the taxpayer, rather than solely on the nominal nature of the asset involved.

Similarly, prior cases and courts which have interpreted and followed *Corn Products* have recognized that the nominal form of the asset is not determinative. Thus, courts have determined that in the context of a particular factual situation, stock purchased and held to acquire markets, marketing technique and know-how,[21] baseball players' contracts which although not primarily held for sale were the essence of the taxpayer's

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[19] This impossibility was acknowledged in *Commissioner v. Gillette Motor Transport, Inc.*, 364 U.S. 130 (1960), as follows: "While a capital asset is defined in [the predecessor to § 1221] as 'property held by the taxpayer,' it is evident that not everything which can be called property in the ordinary sense and which is outside the statutory exclusions qualifies as a capital asset." *Id.* at 134.

[20] This Court has long held that it is the substance and not the form of a transaction which is determinative of federal income tax consequences. *See, e.g., Commissioner v. Court Holding Company*, 324 U.S. 331, 334 (1945), *Gregory v. Helvering*, 293 U.S. 465, 470 (1935).

[21] *Schlumberger Technology Corp. v. United States*, 443 F.2d 1115 (5th Cir. 1971).

business,[22] bonds deposited as security for the performance of a contract,[23] stock purchased to prevent a lawyer from being terminated as that corporation's legal counsel,[24] stock purchased to insure a supply of dresses for a department store,[25] and stock acquired to insure a source of supply of petroleum products for a wholesaler of petroleum products,[26] were not capital assets. Congress could not draft a capital asset definition which would give the correct classification simply by looking up any of the foregoing, or any as yet unanticipated items, in a statutory list of exclusions and inclusions. The courts, however can, and do, make the statute work.

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[22] *Hollywood Baseball Ass'n v. Commissioner*, 423 F.2d 494 (9th Cir. 1970), *cert. denied*, 400 U.S. 848 (1970).

[23] *Commissioner v. Bagley & Sewall Co.*, 221 F.2d 944 (2nd Cir. 1955).

[24] *Steadman v. Commissioner*, 424 F.2d 1 (6th Cir. 1970), *cert. denied*, 400 U.S. 869 (1970).

[25] *Smith & Welton, Inc. v. United States*, 164 F. Supp. 605 (D. Va. 1958).

[26] *FS Services, Inc. v. United States*, 413 F.2d 548 (Ct. Cl. 1969).

CONCLUSION

Thirty-two years have passed since this Court's decision in *Corn Products*. Over that period the lower courts have developed a substantial and flexible body of case law in reliance on it which has adapted tax consequences to the substance of business transactions. Congress has recognized and accepted that body of case law, effectively reaffirming it as an appropriate interpretation of the statute and Congressional purpose. If and when Congress chooses to change that law it may easily do so prospectively. The decision of the Eighth Circuit panel below attempts to overrule this Court's opinions on the subject and the case law based upon them. It should be reversed.

Respectfully submitted,

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